UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

WASHINGTON HOSPITAL CENTER CORPORATION d/b/a MEDSTAR WASHINGTON HOSPITAL CENTER **And** **NATIONAL NURSES UNITED**	**CASE NOS. 05-CA-095883** **05-CA-099390**

REPLY BRIEF BY RESPONDENT MEDSTAR WASHINGTON HOSPITAL CENTER TO THE GENERAL COUNSEL'S ANSWERING BRIEF OPPOSING RESPONDENT'S EXCEPTIONS

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Respondent MedStar Washington Hospital Center ("Respondent" or "the Hospital") submits this Reply Brief to Counsel for the General Counsel's ("GC") Answering Brief ("Answering Br.") opposing Respondent's exceptions to the Decision and Order of the Administrative Law Judge ("ALJD"). Specifically, Respondent has demonstrated that it has presented ample evidence of a legitimate and substantial confidentiality interest in the staffing matrix tracking data and AHRQ survey results requested by National Nurses United ("NNU" or "the Union"), which are the subject of this case.

ARGUMENT

I. Respondent Has a Legitimate Confidentiality Interest in the Requested Information Based on D.C. Law

"As have other jurisdictions, the District ensures the confidentiality of peer review proceedings in order to foster effective review of medical care and thereby improve the quality of health care." *Ervin v. Howard Univ.*, 445 F. Supp. 2d 23, 26 (D.D.C. 2006) (quotation marks omitted). Specifically, the D.C. Council has adopted a "broad statute" that protects from discovery information used by peer review bodies at hospitals. *Id.* at 25. The statute defines "peer review body" expansively to include any "committee," "board," or "reviewing panel or officer" of a hospital. D.C. Code § 44-801(6). "Peer review" itself requires a "procedure" that "looks at the past, in an effort to plan for the future." *Ervin*, 445 F. Supp. 2d at 27-28.

At the hearing before the ALJ, Respondent presented ample testimony that the staffing matrix tracking data and the AHRQ survey results are used by Hospital management committees to review past experience in order to plan for future improvements. For example, Hospital Vice President of Outcomes Research Barbara Mitchell testified that she worked with a Director of Quality, as well as with a quality control team at Respondent's parent corporation, to administer the AHRQ survey and then "use the data for performance improvement." (Tr. 26:2-23.)

Similarly, Vice President of Nursing Excellence Rosemarie Paradis explained that she works with nursing leaders and directors to monitor the Hospital's performance by reviewing the staffing matrix tracking data, in order to "improve patient services." (Tr. 67:3-14; *see also* Tr. 85:3-86:4 (describing how nursing managers use the staffing matrix tracking data to make long-term scheduling decisions based on shortages or overages reflected in the staffing data).)

The Hospital's confidentiality interest is inherent in these self-analytical processes. *See Ervin*, 445 F. Supp. 2d at 28 (observing that "how [statistics are] used and that they [are] used in a true peer review process would not be" discoverable). Accordingly, the GC's assertion that Respondent's interpretation of the peer review statute would allow it to withhold documents such as pay scale data or personnel files is of no moment. (Answering Br. 29.) Unlike the AHRQ survey results and the staffing matrix tracking data, such documents are not maintained by the Hospital for the primary purpose of reviewing its past performance and making improvements to patient safety going forward. (*See, e.g.*, Tr. 42:15-17.)

The very context in which the Union has requested these documents demonstrates that they fall under peer review protection. Indeed, the purpose of the Professional Practice and Patient Safety Council ("PPPSC"), which requested the AHRQ survey, is to "recommend [to the Hospital's Chief Nursing Executive] evidence-based measures objectively to improve patient care." (Jt. Ex. 1, Art. 31.2(b).) Similarly, the Nurse Staffing and Productivity Committee, the joint union-management committee which requested the staffing matrix tracking data, was formed because both parties acknowledged that "appropriate staffing is essential to providing quality and safe patient care." (*Id.* at Art. 30.3(a).) The fact that the parties' collective bargaining agreement establishes committees to guarantee nurse input into the Hospital's peer review processes must not be interpreted as a waiver of the peer review privilege.

In addition, Respondent's witnesses articulated a concern that release of the staffing matrix tracking data or the AHRQ survey results could damage the Hospital's reputation and potentially open it to litigation. (*See, e.g.*, Tr. 47:14-24; Tr. 94:4-95:1.) These are the very types of outcomes against which the D.C. statute protects. *Ervin*, 445 F. Supp. 2d at 26. Accordingly, Respondent has articulated a legitimate confidentiality interest in this information.

II. Respondent Has a Legitimate Confidentiality Interest in the Requested Information Based on Public Policy Considerations

As set forth in Respondent's initial brief, both Board precedent and D.C. law recognize that medical institutions have a legitimate confidentiality interest in self-critical analyses. (Resp't's Br. 6-10.) Specifically, in *Borgess Medical Center*, the Board held that a hospital had a confidentiality interest in reports documenting medical errors, where it used such reports to "identify trends and improve its processes so as to reduce the likelihood that a patient will suffer serious injury or death." 342 N.L.R.B. 1105, 1105 (2004).

The GC claims that *Borgess* is distinguishable from the instant case because Respondent has not argued that the AHRQ survey results or the staffing matrix tracking data are maintained to "ensur[e] the health and well-being of specific patients."[1] (Anwering Br. 21, 31.) This assertion ignores both the record evidence and the Respondent's briefing. (*See, e.g.*, Resp't's Br. 8.) Indeed, Ms. Mitchell specifically rejected the GC's argument that the AHRQ survey is administered as a working conditions survey. (Tr. 42:14-43:1; *id.* at 23:15-18.) Similarly, Ms. Paradis testified that the staffing matrix is used for the purpose of "improv[ing] patient services."

[1] The GC further contends that *Borgess* is distinguishable because the incident reports involved "sensitive patient data" and because the reports were prepared in anticipation of litigation. (Answering Br. 21-22.) The GC does not point to any support for her implication that the Board based its decision on the existence of "sensitive patient data," however. Moreover, the Board rejected the employer's contention in *Borgess* that the reports were privileged because they were prepared in anticipation of litigation. *Borgess*, 342 N.L.R.B. at 1106 n.5.

(Tr. 67:10-14.) And NNU representative Bradley Van Waus explicitly linked his request for the staffing matrix tracking data to the Hospital's "patient care record." (Resp't Ex. 19.) The GC's attempt to portray the requested documents as dealing *only* with working conditions, and thus as distinguishable from the information requested in *Borgess*, is neither accurate nor persuasive.

III. Respondent Has a Legitimate Confidentiality Interest in Preventing the Release of Potentially Harmful Documents

Respondent's witnesses emphasized—consistently and repeatedly—that due to the ease with which the AHRQ survey results and the staffing matrix tracking data can be misinterpreted, public release of the data could cause the Hospital irreparable injury. The GC now contends that Respondent never asserted that the release of the requested information could undermine the Hospital's competitive standing or the public's trust in the Hospital. (Answering Br. 34.) The record clearly indicates the contrary. For example, Ms. Paradis testified that release of the staffing matrix tracking data could "damage the reputation of the Washington Hospital Center" and "cause unnecessary and . . . irreparable harm to the organization." (Tr. 94:23-95:1). Similarly, the parties agreed that Respondent's primary concern with respect to the confidentiality of the AHRQ survey results is its fear that, if third parties are privy to employees' critiques of its safety environment, they would "tak[e] them, twist[] them, [and] publish[] them in such a way that would damage the Hospital" and make members of the public hesitant to seek Respondent's services. (Tr. 48:13-16; 47:20-23.)

Concerns of these sort can form the basis of a legitimate confidentiality interest under existing Board precedent. *See Stella D'oro Biscuit Co.*, 335 N.L.R.B. No. 158, slip op. at 6 (2010) (finding employer's interest in financial statement showing poor financial condition "legitimate"); *SDBC Holdings, Inc. v. NLRB*, 711 F.3d 281, 293 (2d Cir. 2013) (finding that "Stella D'oro raised a legitimate confidentiality concern, as the Board majority has

acknowledged . . ."). The GC emphasizes that the Board in *Stella* ultimately rejected the confidentiality defense of the employer. However, the Board based its decision on the fact that the Union had offered to sign a confidentiality agreement that would cover the requested information. *Stella D'oro Biscuit Co.*, slip op. at 6. By contrast, in this case, the Union has explicitly contended that neither the AHRQ survey results nor the staffing matrix tracking data are confidential. (*See* Resp't Ex. 19; GC Ex. 38.)

Finally, the GC argues that "Board law is replete with cases where employers have been required to furnish the Union with information that could potentially undermine public confidence in the employer's business." However, the first case cited in favor of this proposition does not involve an employer claim of confidentiality. (Answering Br. 36 (citing *Mt. Clemens Gen. Hosp.*, 335 N.L.R.B. 48 (2001).) Similarly, to the extent that it involved competitively significant information, *Westinghouse Electric Corp.*, 239 N.L.R.B. 106 (1978), was decided on the grounds of relevance rather than confidentiality. *Id.* at 114-15 (ordering employer to disclose certain statistical data, but finding information including "candid self-analysis" and "confidential information which could cause [employer] harm" not relevant).

In short, the cases cited by the GC are inapposite. While "fear of embarrassment" is not a legitimate basis for a confidentiality defense, the Board has found that an employer may claim a confidentiality interest in information which, if released, would harm its business operations.

IV. Confidentiality Protections Would Not Interfere with the Union's Asserted Need for the Information

Despite the GC's repeated suggestions to the contrary, Respondent has not cited confidentiality as an excuse for refusing to turn over either the staffing matrix tracking data to

the NSPC or the AHRQ survey results to the PPPSC.[2] To the contrary, the Hospital has agreed to provide both sets of documents to the Union, provided that the Union accommodates its legitimate confidentiality concerns. (Resp't's Br. 1.) Instead, the Union has refused to work within the committees established by the collective bargaining agreement and has stuck to the position that it has the right to share the information—which the Hospital maintains as confidential peer review documents—with the public at large and even the D.C. government. (Tr. 184:11-17.) As set forth in Respondent's opening brief, the Union has not pointed to any reason why its interests in publicizing the requested information outweigh Respondent's legitimate and substantial confidentiality interest. *See BP Exploration (Alaska), Inc.*, 337 N.L.R.B. 887, 890 (2002) (upholding confidentiality claim where Union failed to demonstrate its need for reports covered by attorney-client privilege).[3]

V. Respondent Timely Raised Its Confidentiality Defense and Negotiated in Good Faith for an Accommodation

A. *AHRQ Survey Results*

In response to the Union's initial request for complete access to the AHRQ safety survey data, Assistant Vice President for Human Resources Kathleen Chapman explained that the Hospital could not provide the results in their entirety because the data was confidential. (Tr. 161:18-162:4; Resp't Ex. 10 at WHC-00022.) She agreed, however, to "check to see if there [were] any summaries or results in another format that may be released." (Resp't Ex. 10.) The Union later clarified to Ms. Chapman that it was not asking for the raw survey data in its entirety,

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[2] For this reason, the GC's assertions that the D.C. Code is inapplicable or pre-empted by the Act is irrelevant.

[3] *Westinghouse Electric Corp.*, 239 N.L.R.B. at 110-111, cited by the GC, does not change this conclusion. The Board in that case found that the employer had no confidentiality interest in the requested information and therefore did not proceed to balancing the employer's and the union's interests.

but rather for reports summarizing this data. (Tr. 108:13-24.) Ms. Chapman stated that she was willing to release these reports, pursuant to the Union's agreement to maintain the reports' confidentiality. (Tr. 109:1-21.)

Ms. Chapman then instructed Respondent's outside counsel to work with the Union's outside counsel to develop a confidentiality agreement to which both parties could consent. (Tr. 109:18-21.) In October, Ms. Chapman forwarded the Union an agreement that specifically addressed Respondent's concerns by specifying that the safety survey constituted confidential information. (Resp't Ex. 12 at WHC-000058.) After more negotiation between the parties' counsel, however, Hospital leadership was presented for the first time with a new draft confidentiality agreement, which the Union had signed. (Resp't Ex. 15.) This draft did not specify that the safety reports would be treated as confidential, and, indeed, the Union did not intend for the agreement to cover the AHRQ survey reports. (GC Ex. 38.) Unsurprisingly, the Hospital did not view this arrangement as a sufficient accommodation. (Tr. 120:15-23; 139:3; 140:7-24.) Respondent then proposed an alternative, offering the Union the chance to review the data *in camera*. (*Id.* at 121:3-9). The Union rejected this offer, and the parties continued to bargain over an accommodation through the week before the ALJ hearing. (Tr. 140:1-3.)

B. *Staffing Matrix Tracking Data*

The Hospital also attempted to negotiate an accommodation with respect to the staffing matrix tracking data, which NNU shop steward Stephen Frum requested for use by the NSPC. (Resp't Ex. 16.) Ms. Chapman responded to Mr. Frum's request within two days, emphasizing that the NSPC would have to come to an understanding on confidentiality before the information could be released. (*Id.*) NNU refused to sign a confidentiality agreement for any information other than protected health information, and abruptly ended discussions on the subject during the first two meetings of the NSPC. (Tr. 123:15-124:8; 126:11-21; Resp't Ex. 17 at WHC-000090.)

In addition, the Union ignored Ms. Chapman's request for additional meetings of the NSPC, stating that it was "only concerned about [the Hospital] providing information about [its] adherence to the matrix." (Resp't Ex. 19 at WHC-000116.)

C. *Respondent Timely Raised Its Confidentiality Defense*

The GC maintains that the Hospital has not demonstrated that it is has a legitimate confidentiality interest in the requested information because it did not specifically cite the D.C. Code or concerns about public confidence in its response to NNU's information requests. The cases cited by the GC, however, do not support the argument that this is a requirement. Specifically, in *Crittenton Hospital*, the Board found that an employer's confidentiality defense, based on the Michigan peer review statute at issue in *Borgess*, was untimely where it was raised nearly one year after the information request was made, in an amended answer, five days prior to the start of the hearing regarding the unfair labor practice charge. *Crittenton Hosp.*, 342 N.L.R.B. 686, 694 (2004). Before filing its amended answer, the responding party in *Crittenton Hospital* had asserted that the requested information simply was not relevant. *Id.*

Similarly, in *Earthgrains Co.*, 349 N.L.R.B. 389 (2007), the Board adopted the finding of an ALJ that an employer's confidentiality defense was weakened—but not waived—where the employer failed to raise the defense until over four months after it had received an information request, during which time its counsel had drafted a letter and a position statement stating only that the information was irrelevant. *Id.* at 396-97. Moreover, the ALJ in *Earthgrains* found that the employer did not meet its burden of proving that it had a legitimate and substantial confidentiality interest in the requested information, as it never asserted a single justification for its confidentiality defense, "*including in the post trial brief.*" *Id.* at 397 (emphasis added). Instead, the employer simply stated that the information was "highly confidential." *Id.*

In contrast to the employers in *Crittenton Hospital* and *Earthgrains*, Respondent asserted its defense of confidentiality in its initial responses to the Union's requests for information and has not wavered from its position that the documents are confidential. (Resp't Ex. 17 at WHC-00091; Resp't Ex. 10 at WHC-000022.) Unfortunately, despite extensive negotiations, the parties were unable to reach an accommodation of Respondent's concerns. Board law now requires Respondent to "show that it has a legitimate and substantial confidentiality interest in the information sought." *N. Ind. Pub. Serv. Co.*, 347 N.L.R.B. 210, 211 (2006). Respondent demonstrated this interest at length during the hearing and its briefing focusing exclusively on the issue of confidentiality and pointing to Board precedent that protects the type of self-critical, potentially damaging information at issue in this case.

D. *Respondent Bargained in Good Faith for an Accommodation*

As demonstrated above, the record evidence shows that Respondent repeatedly bargained for an accommodation of its legitimate confidentiality concerns. Nonetheless, the GC argues that Respondent's proposal to allow the union to engage in *in camera* review of the AHRQ survey results constitutes bad faith bargaining. (Answering Br. 44-45.) The GC's argument fails for two reasons. First, the Board has recognized that an employer may refuse to provide copies in response to legitimate confidentiality concerns. *Am. Tel. & Tel. Co.*, 250 N.L.R.B. 47, 55 n.3 (1980) ("There may be . . . cases in which photocopying is inappropriate because of questions of confidentiality . . . ."); *see also Stella D'Oro Biscuit Co.*, slip op. at 6 (emphasizing that employer had "never claimed grounds for believing that the Union would not honor [a confidentiality] agreement" in refusing to provide copies). Second, the Hospital continued to offer additional proposals to the Union after this offer, and the parties, until the Union reversed field, were close to agreement. (Tr. 14:20-23; 187:16-18.)

The GC also argues that Respondent failed to bargain in good faith because it refused to execute a confidentiality agreement that did nothing to address its confidentiality concerns. (Answering Br. 46-47.) This argument similarly fails, as there was no meeting of the minds over the scope of the confidentiality agreement being negotiated. In particular, Ms. Chapman testified that the Hospital never intended to release the AHRQ survey reports absent assurances that their confidentiality would be maintained. (Tr. 114:12-18.) By contrast, the Union never agreed that the AHRQ survey reports would be covered by the confidentiality agreement. (GC Ex. 38.)

Third, although the GC argues that Respondent ceased negotiating with the Union for an accommodation regarding the staffing matrix tracking data, (Answering Br. 47) the evidence demonstrates the contrary. Specifically, representatives of the NSPC declined to sign a confidentiality agreement, although Ms. Chapman suggested using the draft being developed for the AHRQ safety survey as a starting point. (Resp't Ex. 17.) Union representatives then declined to respond to Ms. Chapman's request for additional NSPC meetings to negotiate further a mutual agreement on confidentiality provisions. (Resp't Ex. 19; Tr. 129:16-130:3.)

Finally, the ALJ did not make any findings regarding whether the parties bargained in good faith. Importantly, he did not resolve a key credibility issue concerning whether Respondent's refusal to sign the confidentiality agreement negotiated by outside counsel was the result of a misunderstanding or a "change of heart." (ALJD, p. 3, lines 34-36.) Because the resolution of the GC's claim that Respondent did not negotiate in good faith "turns on credibility determinations that the [ALJ] must make in the first instance," the Board should remand this issue to the ALJ for further review. *See, e.g.*, *Albertson's, LLC*, 359 N.L.R.B. No. 147, slip op. at 1 n.1 (July 2, 2013).

Date: December 6, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2013, a true and correct copy of the foregoing Respondent Medstar Washington Hospital Center's Reply Brief to the General Counsel's Answering Brief Opposing Respondent's Exceptions was served upon the following by email:

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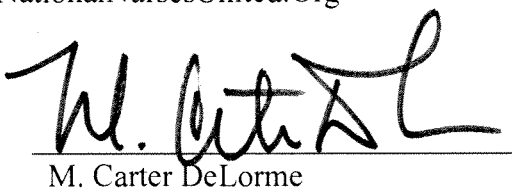

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